9/15/93

ORIGINAL
Transcript of Proceedings

Before the
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	:	Docket No.
AMOCO OIL COMPANY,	:	RCRA-III-225
Respondent.	:	

DATE: September 15, 1993

PLACE: Washington, D.C.

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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In Re:	:	
	:	
AMOCO OIL COMPANY,	:	Docket No. RCRA-III-225
	:	
Respondent.	:	

RULINGS ON MOTIONS FOR ACCELERATED DECISION

AND MOTION TO DISMISS

The above-entitled matter came on for hearing pursuant to Notice before JON G. LOTIS, Judge, 401 M Street, SW, Washington, D.C., in Room Number 2107, on Wednesday, September 15, 1993, at 10:00 a.m.

APPEARANCES (VIA TELEPHONE):

On Behalf of the EPA:

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U.S. Environmental Protection Agency
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On Behalf of AMOCO:

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P R O C E E D I N G S

(Time Noted: 10:00 a.m.)

JUDGE LOTIS: We're on the record now. The reporter has your names for the record.

As I indicated, this session is for the purpose of ruling on some pending matters. As for some background to insure that this transcript is complete, I would like to note that I was assigned this case on February 10, 1993. And by an order issued February 11, 1993, I asked the parties to submit a joint statement of the issues in the case by February 26, 1993. That report was furnished timely by the parties.

Consistent with my directions, the parties' Joint Status Report provided an overview of the case. Rather than recount the procedural history of the case in describing how the case got to this point, I believe the story of the case to date is best summarized by the parties' Joint Status Report.

I hand the reporter now a copy of that Joint Status Report, and ask that she copy it into the record at this point, as if read. That will appear in the transcript at this point.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In Re:	)	
	)	
AMOCO OIL COMPANY	)	Docket No. RCRA-III-225
Yorktown Refinery	)	
P.O. Box 578	)	
Yorktown, Virginia 23690	)	
	)	
RESPONDENT	)	

JOINT STATUS REPORT

As directed by the Administrative Law Judge in his Order of February 11, 1993, the parties are hereby filing a joint status report on this matter, including the information requested in that Order.

1. **CHRONOLOGICAL HISTORY OF PROCEEDING**

On August 1, 1991, the U.S. Environmental Protection Agency ("EPA") filed the Complaint in this action against Respondent, Amoco Oil Company ("Amoco"). The Complaint contained 18 counts, each of which alleged violations of certain hazardous waste regulations issued by the Commonwealth of Virginia, by Amoco's petroleum refinery located in Yorktown, Virginia. The Complaint requested payment by Amoco of an administrative penalty of $5,505,441. Subsequently, on September 30, 1991, EPA filed a First Amended Complaint, which contained 17 counts and requested payment of $5,547,319. On October 21, 1991, Amoco filed its Answer to the First Amended Complaint, essentially denying EPA's allegations.

On November 4, 1991, Amoco filed a Motion for Accelerated Decision and supporting Memorandum, requesting that the Administrative Law Judge grant summary judgment for Amoco on 12 of the 17 counts in the First Amended Complaint. On December 18, 1991, EPA filed its response to Amoco's motion, as well as its own Cross-Motion for Partial Accelerated Decision on the same counts covered by Amoco's motion. Amoco filed its reply on January 26, 1992, and EPA submitted its reply on February 18, 1992. In EPA's reply memorandum, the Agency stated that it would withdraw the five counts related to the sour water stripper (Counts II, III, IV, V and relevant portions of Count VIII). It has not yet formally done so.

On April 22, 1992, Amoco filed a supplemental motion in this matter, requesting that the Administrative Law Judge dismiss the four counts in the First Amended Complaint concerning "landfarm runoff" (Counts X, XI, XII and XIII) based on the D.C. Circuit's recent decision in Shell Oil Co v. EPA, 950 F.2d 741 (D.C. Cir. 1991). EPA responded to that motion on May 18, 1992, and Amoco filed its reply on June 5, 1992.

On June 24, 1992, the parties participated in an oral argument before Administrative Law Judge Yost on the counts covered by the pending motions (not including the five "sour water stripper" counts, which EPA had agreed to withdraw). EPA hired a court reporter and agreed to forward a copy of the transcript of the oral argument to the Administrative Law Judge. The Administrative Law Judge retired effective September 4, 1992, without rendering

a decision on the outstanding motions. Settlement discussions have essentially been suspended pending the outcome of the motions. There has been no further action in this matter since that time.

2. **PREHEARING EXCHANGE**

A prehearing conference has never been scheduled and the prehearing exchange contemplated by 40 CFR §22.19(b) has not been accomplished. Lists of witnesses and experts have not been exchanged. However, substantial amounts of relevant information have been exchanged in the form of voluminous exhibits to the parties' supporting memoranda. Additional documents have been exchanged as part of settlement negotiations.

3. **PENDING MOTIONS AND/OR PLEADINGS**

The only motions and/or pleadings pending and not yet acted upon are the three motions discussed above (Amoco's November 4, 1991 Motion for Accelerated Decision, EPA's December 18, 1991 Cross Motion for Partial Accelerated Decision, and Amoco's April 22, 1992 Motion to Dismiss based on Shell Oil), and the memoranda and reply memoranda filed in support of those motions.

4. **SETTLEMENT DISCUSSIONS**

Amoco and EPA met for initial settlement discussions on August 20, 1991. Further discussions were held shortly after Amoco's Motion for Accelerated Decision was filed in November 1991. On most issues, it was clear that further settlement discussions would not be fruitful. On several issues, Amoco presented additional information during the settlement meetings, which EPA committed to

consider and respond to. Subsequently, EPA sent Amoco a letter discussing those issues, but adhered to the positions expressed in the Complaint. No further settlement discussions have taken place. The parties believe that additional settlement discussions would not be productive until after the Administrative Law Judge rules on pending motions.

5. **ADDITIONAL INFORMATION**

Amoco suggests that the pending motions be scheduled for a new oral argument. Given the voluminous information that has been presented in support of the outstanding motions, we believe that an oral argument would be an efficient way to focus the issues presented here for decision. It would also give the parties an opportunity to address, in a direct fashion, any questions or concerns that the Administrative Law Judge may have based on his review of the materials that have previously been submitted.

EPA believes that because this Court has a transcript of the first oral argument the scheduling of second oral argument is not necessary. If this Court has any questions regarding issues addressed by the previous argument or any other issue, EPA is prepared to provide additional written or oral arguments.

Cecil Rodrigues
Attorney for U.S. Environmental Protection Agency

2/26/93
Date

Debra F. Mitchell
Attorney for Amoco Oil Company

2/25/93
Date

JUDGE LOTIS: In that report, the parties state that further settlement discussions would not be productive until I rule on certain pending motions. The pending motions are these: Amoco's November 4, 1991 Motion for Accelerated Decision; the Complainant's December 18, 1991 Cross-Motion for Partial Accelerated Decision; and Amoco's April 22, 1992 Motion to Dismiss.

Of course, also before me are all of the pleadings related to those documents. There were quite a few.

In the Joint Status Report, Amoco suggests that as the new judge on this case I schedule another oral argument. The EPA, Complainant, believes another oral argument is unnecessary. I agree with the EPA. I have read the transcript of the oral argument, and I have also read the pending motions and related papers. Stacked end to end, they measure about nine inches. No further argument, I believe, is necessary or will be entertained. To me, the issues are clearly joined at this point.

I will now proceed to ruling on the motions. There are 17 counts against Amoco in EPA's Amended Complaint in which EPA is seeking about $5.5 million in penalties. Amoco's Motion for Accelerated Decision seeks to dismiss 12 of the 17 counts. EPA's Cross-

Motion seeks a judgement in its favor on the same 12 counts.

The 12 counts for which dismissal and summary judgement is sought relate to four issues. The four issues are: The sour water stripper issue, an unloading basin issue, a storm water run-off issue, and a heat exchanger cleaning pad issue. However, in EPA's reply dated February 18, 1992 to one of Amoco's pleadings, EPA says that it will withdraw the counts related to the sour water stripper issue, because it discovered that the sour water stripper is a reclamation unit, which is exempt from certain regulations. The counts withdrawn are Counts 2, 3, 4, 5 and the relevant portion of Count 8.

While EPA counsel did not file a motion withdrawing those counts, I will deem those counts withdrawn by the force of EPA counsel's statement in the February 18, 1992 pleading: that the sour water stripper is not subject to the regulations here involved. I also accept and give full faith and credit to EPA counsel's statement at the June 24, 1992 oral argument to that same effect.

The sour water stripper issue amounts to about $1.1 million of the total $5.5 million in penalties, which the EPA seeks to assess. That leaves

outstanding the counts in the complaint related to three issues: storm water run-off, unloading basin, and heat exchanger cleaning pad.

I'll begin with the storm water run-off issue. The storm water run-off issue relates to Counts 10, 11, 12 and 13 of the First Amended Complaint. The total penalty associated with those counts is $1.7 million. On April 22, 1992, Amoco filed a Motion for Dismissal of those counts of the complaint. The grounds for dismissal are that those four counts rely on an alleged violation of the so-called EPA "Mixture Rule," which has been invalidated by the U.S. Circuit Court of Appeals for the District of Columbia.

The D.C. Circuit case is that of Shell Oil Company v. EPA, found at 950 F. 2d 741, a 1991 case. In that case, the court held that the EPA "Mixture Rule" and Derived-From rules were invalid because the EPA failed to satisfy the notice and opportunity for comment requirements of the Administrative Procedure Act.

In response to the motion, Complainant makes two basic arguments. 1) That the D.C. Circuit's decision does not operate retroactively; and 2) Even if it is held that the D.C. Circuit's decision operated retroactively, EPA can still enforce the Virginia

"Mixture Rule" in this case. Complainant's reasoning is that the Virginia "Mixture Rules" can be enforced because they are more stringent than the federal program, and that only if the state laws go beyond the scope of the coverage of the federal program would these laws not be enforceable. Complainant argues that the state "Mixture Rules" do not go beyond the federal program.

Complainant's second argument is premised on its interpretation of an EPA regulation found at 40 C.F.R., Section 271.4. First, I would like to discuss EPA's argument as to retroactivity. As a general proposition and one that is not subject to serious debate, when a court finds an agency rule invalid, it is considered invalid or void abinitio. The EPA said so when it asked the D.C. Circuit for clarification of its Shell decision. I will quote from pages 3 and 4 of the EPA Reply in Support of its Motion for Clarification of the Court's Opinion.

"EPA does not dispute that generally a rule is invalidated abinitio when notice and comment requirements were not met. However, under the unique circumstances of this case, EPA does not believe that the Court intended that result here."

The D.C. Circuit denied EPA's Motion for

Clarification. When it had an opportunity to carve out an exception to the general principal under what EPA said were the unique circumstances of the Shell case, the court refrained from doing so. The general principal or proposition must, therefore, be applied, and the Mixture and Derived-From Rule considered invalid or void from inception. To hold otherwise and to impose penalties based on a rule which had been struck down as invalid by the court and where the court denied EPA's Motion for Clarification, in my judgement, would be contemptuous of the D.C. Circuit's decision.

This brings me to EPA's second argument. The proposition EPA advances here is that -- and I'll quote from pages 11 and 12 of its Motion in Opposition to Amoco's Motion to Dismiss.

"State requirements which are more stringent are a part of the federal program and are enforceable by the EPA, while state requirements which are broader in scope are not part of the federally approved program and cannot be enforced by EPA."

With the invalidation of the Federal Mixture and Derived-From Rule, the question becomes whether the Virginia program, which still contains the Mixture and Derived-From Rules is broader in scope or more stringent than the federal program. This is the

precise issue pending before the Environmental Appeals Board in the case titled, "In Re: Hardin County, Ohio," Docket Number RCRA-V-W-89-R-29. That case is an appeal from a decision dated May 27, 1993 by Judge Nissen.

Rather than restate the arguments that have been made and presented to the Board in the Hardin County case, to me, would be an uneconomical use of the resources of this office. And it appears to me that savings to all parties can be achieved by making this decision in this case subject to and condition to the outcome of that issue in the Hardin County case.

To summarize my actions on Amoco's Motion to Dismiss Counts 10, 11, 12 and 13, based on the Shell Oil case, first, I find that EPA's Mixture and Derived-From Rule was invalidated by the D.C. Circuit retroactively. Second, the issue raised by EPA as to the enforceability by EPA of the Virginia Mixture and Derived-From Rule is conditioned and made subject to the outcome of the Hardin County case.

Under these circumstances, the motion is held in abeyance with respect to this argument pending a decision of the Board in the Hardin County case. Within 30 days of the issuance of the decision in that case, the parties shall report the same to the undersigned, to me, with a recommendation for

appropriate action to be taken in this proceeding.

This brings me to the unloading basin issue. Here, the Complainant charges that the Respondent's unloading basin stores hazardous waste for longer than 90 days, and therefore requires a permit or interim status. For failure to obtain that interim status of permit, the Complainant seeks penalties of about $750,000 covered by Counts 7, 8 and 9 of the Amended Complaint.

The facts describing the nature and function of the unloading basin appear undisputed. The unloading basin is actually a 5,000-gallon tank of steel construction and it's about 15 feet tall. The 5,000-gallon tank acts as an unloading basin for sludge oil that is pumped into the Yorktown refinery sludge oil recovery 75,000-gallon tank. That tank has interim status. The pump inside the unloading basin consists of a motor and eight-foot shaft that is fastened to the inside roof of the basin, and a strainer which is six inches high and suspended six inches from the bottom of the basin.

Waste sludges from oil refinery process units are carried by truck to the unloading basin, where the trucks back up to a ramp and empty the sludges into the opening at the top of the basin. On average, that

operation is said to occur about 10 to 15 times a week.

The basin has a slanted bottom so that the sludge collects at the lowest point in the basin. Every second time that a load of sludge is emptied into the basin, I am told, the pump is turned on and the sludge is pumped over to the nearby 75,000-gallon tank until the pump automatically shuts off. This happens when the sludge level drops below the top of the strainer which is one foot from the bottom of the basin. Thus, because of the slant of the bottom of the tank, I think it's fair to say that less than one foot of sludge actually remains in the tank.

When sludge solids in the bottom of the basin become too heavy to pump, whether the sludge level is at one foot level above the bottom of the basin or four foot from the bottom of the basin, Amoco will send in personnel to manually shovel the material out.

According to Amoco, the unloading basin also undergoes a complete maintenance turn-around once or twice a year. There appears to be a difference of opinion here in that the Complainant states that an Amoco employee stated during the site inspection that the unloading basin had not been cleaned out in the one and a half years he had worked there.

There are three basic arguments that Amoco

makes in which it denies that it violated any regulations concerning its unloading basin. First, Amoco argues that the unloading basin stores hazardous waste for less than 90 days, and therefore is exempt from the requirement to obtain a permit or interim status for the basin. Second, Amoco argues that even if the unloading basin does not qualify for the 90-day exemption rule, it is a piece of ancillary equipment to the 75,000-gallon tank, which had been granted interim status. Therefore, according to Amoco, the unloading basin is included in the interim status of the 75,000-gallon storage tank.

Amoco's third argument is that the violation citing Amoco for failure to inspect the discharge control equipment connected to the unloading basin is erroneous since the phrase discharge control equipment is vague and does not precisely define the equipment that Amoco has failed to inspect.

I'll deal with Amoco's first argument that the unloading basin does not need interim status because it qualifies under the 90-day exemption rule. The rule allows storage equipment to go without interim status of a permit if the contents of the storage facility are emptied "to the fullest extent possible" every 90 days. The difficulty in interpreting this

rule lies in understanding what is considered empty for the EPA's standard of "fullest extent possible."

EPA stated in its Federal Register notice that, "Since many tank designs do not allow for complete drainage due to flanges, screens or siphons, it is not expected that 100 percent of the waste will always be removed. As general guidance, a tank should be considered empty when the generator has left the tank's drainage system open until a steady continuous flow has ceased." This appears at the 47 Federal Register, page 1248 of the January 11, 1982 Register.

Amoco believes that this language that I've quoted fits its situation exactly, since the pump that pumps the sludge automatically shuts off when it can't pump any more. The EPA recognized that a tank need not be 100 percent clean since in practice, it might be hard to collect and eliminate all waste. In the general guidance the EPA gave in the Federal Register notice, the example given speaks of a generator leaving the tank's drainage system open until a steady, continuous flow has ceased. The EPA recognized in that notice that complete drainage may not always be possible because of flanges, screens or siphons.

The impediment here to complete drainage was the automatic shut-off design in the pump which left

something less than one foot of sludge remaining in the tank. This design was based on the pump manufacturer's recommendation that the pump be placed six inches from the bottom to allow it sufficient room for the pump to suck up the sludges. To place the pump on the floor would eliminate the suction.

According to Amoco, the troubleshooting guide from the manufacturer, Nagle, states that having the suction too close to the bottom of the unit can prevent the pump from operating. The troubleshooting guide is found in Exhibit F of the Respondent's January 25, 1992 set of exhibits attached to its pleading that day.

The situation that has been described to me appears to be that contemplated by the EPA when it recognized that tank designs do not always allow for 100 percent removal of waste. Complainant says that Amoco could have designed the tank differently so that a greater portion of the sludge or all of the sludge could be removed. To this, I say maybe so, but a fair reading of the rule suggests that the EPA did not expect 100 percent waste removal. The notice of the rule said so, and the general guidance given in the rule would suggest to a reasonable person that design considerations such as those present here would be recognized by EPA as satisfying the requirement that

the facility be emptied to the fullest extent possible.

If the EPA believed that the design considerations limiting the amount of waste which could be removed from the tank were insufficient in that they would allow too much waste to remain in the tank, the EPA could have addressed that matter in the rule. And if that was EPA's belief, it could have imposed absolute requirements such that the tank must be 95 percent or 98 percent or 99 percent empty or any one of a number more specific requirements.

As to Complainant's argument that it was possible for the Respondent to go in and shovel out the remaining sludges, it was not required to do so. Amoco emptied the 5,000-gallon tank to the fullest extent possible as contemplated by the rule. It was not required to do more. All of this is not to suggest that design considerations will in all instances control whether a tank is considered empty to the fullest extent possible. To allow a facility design alone to determine whether a facility has been emptied to the fullest extent possible would be to allow tanks to sit with virtually any amount of waste in them if engineering dictated that design for operating and/or economic reasons. If that were the case, the "empty to the fullest extent possible" language would be devoid

of any real meaning. A rule of reason must apply.

In these circumstances, where less than one foot of sludge accumulated in a 15-foot tank and the design of the tank would not allow more to pumped out, then I believe this falls within the practical limitations that the EPA had in mind when it recognized that tanks could not be 100 percent clean of all waste.

Amoco's second argument is that even if the unloading basin is considered to require interim status because it is not emptied frequently enough, it has already been granted that status as part of the sludge oil recovery system. Amoco says that because the 75,000-gallon storage tank was granted interim status on June 4, 1990, that the 5,000-gallon unloading basin was also granted interim status because it operates as ancillary equipment to the larger tank.

40 C.F.R. Section 260.10 states as follows: "Ancillary equipment means any device including, but not limited to, such devices as piping, fittings, flanges, valves and pumps that is used to distribute, meter or control the flow of hazardous waste from its point of generation to a storage or treatment tank or tanks between hazardous waste storage and treatments tanks to a point of disposal on-site or to a point of shipment for disposal off-site."

Amoco argues that the phrase, "including, but not limited to," allows for equipment such as the unloading basin, which it says is used to distribute, meter or control the flow of hazardous waste from its point of generation to a storage or treatment tank. The Complainant argues that this interpretation of the term "ancillary equipment" is in error. EPA says that although the types of devices are specifically enumerated in the definition of ancillary equipment are not intended to comprise a complete list, they are illustrative of the category considered ancillary equipment. EPA argues that a tank cannot be considered in the same category as pipings, fittings, flanges, valves or pumps, no matter how that definition is stretched.

EPA points out that the 75,000-gallon storage tank has its own set of piping, valves and other devices of that sort that fall clearly into the definition of ancillary equipment. To me, EPA's argument makes the best sense. The regulations refer to ancillary equipment as a "device," and then goes on to give examples of devices EPA had in mind. Amoco's 5,000-gallon tank does not fit within a reasonable definition of device as that term is used in the regulations.

The examples of devices given by EPA, while not all-inclusive, give a sense of the kind of equipment EPA was referring to. Examples of pipings, fittings, valves, flanges and pumps suggests that the EPA was not including major facilities such as a 15-foot high, 5,000-gallon tank. The 5,000-gallon tank represents a storage unit, albeit not a permanent storage site for hazardous waste, and requires either interim status or a permit. However, since the tank falls within the 90-day rule, as I have previously found, it is exempt from the permit and interim status requirement.

The third issue regarding the unloading basin is whether Amoco failed to make daily inspections of the basin's discharge control equipment. Count 9 of the Complaint says that Amoco was required to inspect the discharge control equipment for the unloading basin at least once each operating day to insure that it was in good working order. EPA charges that Amoco failed to make these daily inspections because the compliance inspection report prepared by the Virginia authorities after their March 6 and 7, 1990 inspection had a checkmark of "no" next to the question asking whether daily inspections of this equipment had occurred.

Amoco claims that it was unsure of what

discharge control equipment meant, and it inquired at an Amoco/EPA conference as to the basis of the allegation. Amoco argues that since EPA could not point to the specific equipment that had not been inspected, that the charge was too vague and should be dropped. Amoco also explains that it does inspect equipment such as the pump system simply by using it on a daily basis.

In response to Amoco's argument that Amoco did not know what it was that it was failing to inspect, the Complainant says that discharge control equipment includes at a minimum the pump system, which is used daily to drain the basin, and the six-inch drain, which can also drain the unit. According to Complainant's Memorandum, discharge control equipment would also include, if present, any high level alarm equipment or overflow drains and any automatic or manual shut-off valves on several pipes that are shown draining into the unloading basin.

In response to this, Amoco says that EPA fails to understand the operation of the unloading basin. According to the example given by Amoco, the pump strainer, which EPA says should be inspected every day, is submersed and can hardly be visually inspected; and the pump system is, in fact, inspected every day

when it is turned on to pump the sludge into the 75,000-gallon tank. According to Amoco, if it works then, it is in good working order.

As for the six-inch drain, Amoco does not know what kind of inspection EPA is talking about. The drain, according to Amoco, is a tube connected to a hole in the tank, which is always closed and has never been used. According to Amoco, inspections of the entire sludge oil recovery system are done each day to verify that no leaks are occurring from the units. As to the other items mentioned by EPA in its memo concerning high-level alarm equipment, over-flow drains and automatic or manual shut-off valves, the EPA says that they should be inspected if present.

It appears to me that Complainant does not know whether these other items even exist; therefore, it cannot attest to their not being inspected. Amoco's argument as to the vagueness of the charge is well taken. If EPA wants certain types of daily inspections of certain types of equipment, then it should be more specific about what it wants and it needs to document that there has been a violation of the inspection requirements. Moreover, Complainant has not shown why the operation of the unloading basin, as described by Amoco, will not in fact satisfy the inspection

requirements which it says have not been met. For these reasons, Counts 7, 8 and 9 of the Complaint will be dismissed, and I find in favor of Amoco with respect to those counts.

This brings me to the last issue, the heat exchanger cleaning pad, which is covered by Count 6 of the Complaint. Count 6 of the Complaint alleges that on March 6 and 7, 1990, an inspector from the Office of Virginia Department of Waste Management observed that the Respondent's heat exchanger cleaning pad was accumulating heat exchanger bundle cleaning sludge, which is K050, generated by steam-blasting heat exchangers on the cracked, concrete heater exchanger cleaning pad.

Count 6 says that, 1) the sludge is a hazardous waste as defined in 40 C.F.R. Section 260.10; 2) the heat exchanger cleaning pad is a surface entitlement as defined in 40 C.F.R. Section 260.10; and, 3) the Respondent has never obtained a permit or qualified interim status for the heat exchanger cleaning pad.

Count 6 concludes that Respondent violated the RCRA statute and EPA regulations by operating a surface entitlement without interim status or permit. A penalty is sought of approximately $560,000.

The facts describing the function of the heat exchanger cleaning pad appear undisputed. The pad is a concrete pad surrounded earthen berm. The heat exchanger bundles are placed on the pad and high pressure water is directed at them, washing the heat exchanger cleaning sludge onto the pad and towards a drain. The water and waste mixture drains from the heat exchanger cleaning pad into the facility sewer system. Periodically, a small amount of sludge that has not been drained to the sewer system will be picked up by shovels and put into drums for off-site disposal.

There is a factual dispute concerning an inspection made by the Virginia Department of Waste Management on March 6 and 7, 1990. EPA claims that the representatives observed that Amoco's heat exchanger cleaning pad had been accumulating heat exchanger bundle cleaning sludge. Amoco claims that this allegation is untrue. Amoco says that no cleaning took place on the days in question. The last cleaning had occurred four months earlier in November of 1989 when all of the sludge cleaned out of the exchangers had been removed. Amoco claims that any material on the pad during the inspection was running water in small amounts of non-hazardous cleaning agents.

Whether or not heat exchanger bundle cleaning

sludge had been accumulating on the heat exchanger cleaning pad is a material fact put into question by Amoco's and EPA's conflicting accounts in the pleadings. If there had not been any accumulation, then the heat exchanger cleaning pad did not store any waster, and, therefore, should not need a permit or interim status. If there had been accumulation, then storage of waste occurred and Amoco violated the above-stated regulations.

According to regulatory definition, storage is defined as -- and I'll quote from 40 C.F.R. Section 260.10 -- "...the holding of hazardous waste for a temporary period, at the end of which the hazardous waste is treated, disposed of, or stored elsewhere."

Since there is a genuine issue as to the material fact of whether there had been heat exchanger bundle cleaning sludge accumulation on the pad when the Virginia representative made its inspection on March 6 and 7, 1990, then neither party is entitled to judgement as a matter of law. In making this ruling, I have also concluded that the heat exchanger heating pad is not ancillary equipment. It does not fit within the definition and the category of examples given by EPA as illustrative of devices fitting the definition of ancillary.

That completes my rulings. The issues that remain in this case are those issues covered by the counts not subject to the Motions for Accelerated Decision and also those issues, if any, that may arise upon the decision by the Environmental Appeals Board in the Hardin County case; that is, if there are any issues after the decision in that case; and, thirdly, the heating pad issue that I just described.

The issue date of this decision for purposes of appeal shall be the date when the transcript becomes available to the parties through the EPA's regional hearing clerk. Upon receipt of the transcript, I will review it; and, by separate order, if necessary, make transcript corrections. However, I wish to advise the parties that I am not going to make corrections in spelling, grammar or syntax or anything other than something I might have misstated or something that bears upon the substance of my ruling.

Upon review of the transcript, if I am not going to have corrections, I will put out a notice to that effect and fax it to the parties. If there are going to be substantive corrections to the transcript, I'm sure either party may seek additional time for filing an appeal.

Just a final word: the parties are encouraged

to resume settlement discussions. The benefits of a negotiated settlement may far out-weigh any perceived advantages by further litigation or final litigation of these matters. To that end, the parties are directed to file a joint report with me on or before November 15, 1993 as to the status of the discussions.

There being no further matters on my agenda this morning, this matter is adjourned. Thank you all very much.

(Whereupon, at 10:40 a.m., the hearing concluded.)

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C E R T I F I C A T E

This is to certify that the attached proceedings before the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of: AMOCO OIL COMPANY

Docket Number: RCRA-III-225

PLACE: Washington, D.C.

DATE: September 15, 1993

were held as herein appears, and that this is a true and accurate record of the proceedings.

CAPITAL HILL REPORTING, INC.

BY Patricia D. Knowles

OFFICIAL REPORTER